PENANG DEVELOPMENT CORPORATION

v.

KHAW CHIN BOO & ANOR.

HIGH COURT, PENANG
DATUK MOHAMED DZAIDDIN BIN HAJI ABDULLAH SCJ.
[CIVIL APPEAL NO. 11-63-87]
14 JANUARY 1993

CONTRACT: Sale & Purchase agreement - Time for completion of subject matter of agreement - Reasonable time - What amounts to reasonable time - No notice given fixing reasonable time for completion - Whether defect fatal - Defendant exempt body - Whether r. 12(1) Housing Developers (Control & Licensing) Regulations 1982 applicable to fix reasonable time.

The plaintiffs entered into a sale & purchase agreement with the defendant for the purchase of a piece of property. The agreement did not specify the time for delivery of vacant possession. Vacant possession of the property was in fact given to the plaintiffs 3 1/2 years after the execution of the sale & purchase agreement.

The plaintiffs sued for damages for late delivery and relied upon the Housing Developers (Control and Licensing) Regulations 1982 (the Regulations) which specified a period of 24 months for delivery of vacant possession as being a reasonable time. The trial Magistrate held that the plaintiffs had a reasonable cause of action and the defendant appealed.

Held:

[1] The amended statement of claim had failed to plead that the plaintiffs had given notice to the defendant to complete the delivery of vacant possession within a reasonable time. A written notice giving time to complete the delivery was necessary since time by which performance was to be completed was not stipulated nor made the essence of the contract.

[2] A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered. Since the amended statement of claim had failed to plead the vital issue of notice fixing a reasonable time, the amended statement of claim had not disclosed a reasonable cause of action.

[3] The defendant being an exempt body under s. 2 of the Housing Developers (Control and Licensing) Act 1966, the provisions of clause 18(1) of Schedule E of the Regulations do not apply to them and the Magistrate was wrong in law to accept the provisions of r. 12(1) of the Regulations as a reference to determine the question of reasonable time.

[Appeal allowed with costs].

Cases referred to:

Drummond Jackson v. British Medical Association [1970] 1 WLR 688 ***(refd)***
Stickney v. Keeble [1915] AC 386 ***(foll)***
Green v. Sevin [1879] Vol. XIII Ch.D 589 ***(foll)***
Raineri v. Miles [1980] 2 All ER 145 ***(dist)***
Quah Ban Poh v. Dragon Garden Pte. Ltd. [1985] 2 MLJ 159/[1985] 2 CLJ 75 ***(dist)***

Legislation referred to:

Contracts Act 1950, s. 47
Housing Developers (Control and Licensing) Regulations 1982, r. 12(1) Schedule E
Housing Developers (Control & Licensing) Act 1966, s. 2

Other sources referred to:

Halsbury's Laws of England, 4th Ed. Vol. 9 para 485

For the appellant - Lim Ewe Hock; M/s. Lim Kean Chye & Co.
For the respondents - Lim Boo Chang; M/s. Lim Boo Chang & Co

JUDGMENT

Mohamed Dzaiddin bin Haji Abdullah SCJ: This is an appeal from the decision of the Magistrate, Georgetown given on 20 January 1987 who held that the plaintiffs had established a reasonable cause of action against the defendant in their amended statement of claim.

The plaintiffs' claim in the action is for damages for late delivery of vacant possession of a unit of flat known as Flat No. 17.6, Macallum Street Ghaut Slab Block GT7 (the said flat) which they purchased from the defendant for RM62,000. The parties executed a sale and purchase agreement on 25 October 1982. It is common ground that the said agreement was silent regarding the date of delivery of vacant possession. Nonetheless, the delivery of vacant possession of the said flat was finally made by the defendant to the plaintiffs on 22 January 1986 which was more than 3 $^{1}/_{2}$ years after the execution of the sale and purchase agreement.

By their amended statement of claim, the plaintiffs averred in paragraph 4 that vacant possession of the said flat must be delivered within a reasonable time. In this context, the plaintiffs relied on the 24 months' period under the Housing Developers (Control and Licensing) Regulations 1982 (the Regulations) as a reference to determine the issue of reasonable time. Hence, by paragraph 5, the plaintiffs alleged that, in consequence of the averment in paragraph 4, the defendant had failed to deliver vacant possession within a reasonable time which was 455 days exceeding the reasonable time period of 24 months. In the premises, they claimed to have suffered loss and damage.

The defence of the defendant was that the amended statement of claim disclosed no cause of action and they prayed that the plaintiff's action be dismissed with costs.

In the appeal before me, the same point was taken up by Encik Lim Ewe Hock, aside from two other grounds as stated in the memorandum of appeal. So, the crucial issue in this appeal is quite simple and straight-forward, which is, whether the amended statement of claim discloses a reasonable cause of action.

A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in *Drummond Jackson v. British Medical Association* [1970] 1 WLR 688). Here, paragraph 4 merely averred that the delivery must be made within a reasonable time which was to be determined by analogy to the Regulations. Paragraph 5 further alleged that the defendant had failed to deliver vacant possession within a reasonable time. Thus, have the two paragraphs of the amended statement of claim disclosed a reasonable cause of action to enable the plaintiffs to succeed in their claim for damages? In my judgment, there is none.

First, it is common ground that the written agreement did not fix any time for the performance of the contract. So when no time is specified, the contract must be performed within a reasonable time, s. 47 Contracts Act 1950. What is "a reasonable time" is, in each particular case, a question of fact (*ibid*). However, the plaintiffs cannot arbitrarily fix the time. It must be reasonable having regard to the state of things at the time when notice was given. In *Stickney v. Keeble* [1915] AC 386, the House of Lords held as follows:

> Where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end, and in determining the reasonableness of the time so limited the Court will consider not merely what remains to be done at the date of the notice, but all the circumstances of the case, including the previous delay of the vendor and the attitude of the purchaser in relation thereto.

Secondly and more importantly, the amended statement of claim has failed to plead that the plaintiffs have given notice to the defendant to complete the delivery of vacant possession within a reasonable time. What had been pleaded was an allegation that the defendant had failed to deliver vacant possession within reasonable time (paragraph 5). In my opinion, a written notice giving time to complete the delivery is necessary since time by which performance was to be completed has not been stipulated, nor made the essence of the contract. According to **Halsbury's Laws of England**, 4th Ed. Vol. 9 paragraph 485:

> In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken. The time so fixed must be reasonable having regard to the state of things at the time when the notice is given, and to all the circumstances of the case.

In *Green v. Sevin* [1879] Vol.XIII Ch.D 589, Fry, J. stated at page 599:

> One of the earliest cases on this doctrine of engrafting time by notice is *Taylor v. Brown*, and there Lord Langdale, the then Master of the Rolls, expressed his view in this way: 'Where the contract and the circumstances are such that time is not in this Court considered to be of the essence of the contract - in such case, if any unnecessary delay is created by one party, the other has a right to limit a reasonable time within which the contract

shall be perfected by the other.' So in *King v. Wilson*, the same Master of the Rolls laid down the principle in these words:

> Though time may not be of the essence of a contract, yet where there is great and improper delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed.

So again, in *Pegg v. Wisden*, Sir John Romilly said:

> I concur also in the decisions, that where time is not originally of the essence of the contract, it may, in the case of improper delay, be made so by notice.

Encik Lim Boo Chang, Counsel for the respondent, submitted that failure to issue a notice fixing a reasonable time was not fatal. He relied on *Raineri v. Miles* [1980] 2 All ER 145 (HL) and *Quah Ban Poh v. Dragon Garden Pte Ltd.* [1985] 2 MLJ 159. After examining both decisions, I find they do not support the respondent's case. One of the issues in *Raineri* was the effect of service of completion notice calling on the appellants to complete their contract of sale, and in *Quah Ban Poh*, it was held, *inter alia*, that if the defendant had wanted to make time again of the essence of the contract, it should have given the plaintiff a notice fixing a reasonable time within which he must pay the last instalment.

Therefore, for the reason that the amended statement of claim has failed to plead the vital issue of notice fixing a reasonable time, it is my conclusion that the amended statement of claim has not disclosed a reasonable cause of action.

Thirdly, the learned Magistrate was wrong in law to accept the provision of r. 12(1) of the Regulations as a "reference to determine the question of reasonable time". I am satisfied that the defendant, being an exempt body under s. 2 of the Housing Developers (Control and Licensing) Act (Act 118), the provisions of clause 18(1) of Schedule E of the Regulations do not apply to them.

For the above reasons, this appeal is allowed with costs.

PUBLIC PROSECUTOR

v.

KRISHNA S/O KARUPPAN & ANOR.

HIGH COURT, SHAH ALAM
TUAN AZMEL HJ. MAAMOR JC
[CRIMINAL APPEAL NO. CR 52-25-1988]
9 APRIL 1993

CRIMINAL LAW AND PROCEDURE: Charge of corruption - Appeal against acquittal and discharge - Whether there was a bona fide defence - Whether defence reasonable and plausible - Whether reasonable doubt created in prosecution's case - Whether appeal should be allowed.

The public prosecutor appealed against the acquittal and discharge of the two respondents on charges of corruption under s. 4(c) of the Prevention of Corruption Act 1961. The second respondent was acquitted and discharged at the close of the prosecution case as it was held that a *prima facie* case had not been established against him. The first respondent was acquitted and discharged after his defence had been called as the trial Court Judge found his story to be reasonable and plausible.

Held:

[1] The appeal concerned only points of facts and it is established law that an appellate Court should not disturb any findings of facts of the original Court. Nevertheless having regard to the failure of the trial Judge to consider material facts adduced during the trial, the Court was left with the difficult task of evaluating the facts of the case inspite of being handicapped by being unable to see the demeanour of the witnesses.

[2] The trial Judge had failed to give his reasons in the grounds of judgment for finding the defence story reasonable and plausible. A trial Judge must give reasons why he follows the principle of any decided case. He must evaluate the material facts of the case before him before he can come to the conclusion that the defence story is reasonable and plausible.

[3] The defence of the first respondent in the light of the entire evidence produced during the trial had failed to create any doubt in the prosecution case.

[Appeal against acquittal and discharge of first respondent allowed. First respondent